In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1356

JACK J. GRAY, PETITIONER

v.

HOWARD F. JOHNSON, INDIVIDUALLY, AND AS SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, PAWHUSKA, OKLAHOMA, VIRGIL N. HARRINGTON, INDIVIDUALLY, AND AS AREA DIRECTOR OF BUREAU OF INDIAN AFFAIRS, MUSKOGEE, OKLAHOMA, AND STUART UDALL, AS SECRETRY OF THE INTERIOR, AND OKLAHOMA LAND & CATTLE COMPANY, AN OKLAHOMA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The judgment of the district court (Pet. App. B) is not reported. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. C), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1968. The petition for a writ of cer-

tiorari was filed on April 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had discretionary authority to accept an appeal from an administrative decision by a subordinate filed one day late.

REGULATIONS INVOLVED

25 C.F.R. 131.8 provides in pertinent part as follows:

> Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by § 131.5(b) (1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made

with the written concurrence of the owners and the approval of the Secretary.

* * * * *

(c) Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land.

(d) Grazing leases which require substantial development or improvement of the land shall not exceed ten years.

25 C.F.R. 2.14 provides:

When any party fails to appeal a decision of the Superintendent, Area Director, or the Commissioner, that decision shall be final as to such party and will not be disturbed except for fraud or gross irregularity, or where it is found by higher authority that the failure to appeal on the part of an Indian or Indian tribe would result in an inequity or injustice to the Indian or Indian tribe.

25 C.F.R. 2.10(a) provides:

An interested party who wishes to appeal to the Area Director or Commissioner shall initiate his appeal by filing a written petition with the official who made the decision. Such official if requested by an Indian or Indian tribe shall render such assistance as is appropriate in the preparation of any appeal by an Indian or Indian tribe. The petition should give an identification of the case a statement of reasons for the appeal and any arguments the petitioner wishes to make. The petition must be received in such office within 20 days after the date of the mailing of the notice of the decision complained of to the petitioner unless further time

is granted pursuant to the regulations in this part. The petitioner also may file an additional written statement of reasons and arguments or briefs with the Area Director or the Commissioner within 10 days after the filing of the petition.

25 C.F.R. 2.4 provides:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

25 C.F.R. 2.35 provides:

> The period for filing or serving any document may be extended or waived on behalf of an interested party by the officer to whom the appeal is taken, for good cause found by the officer. The Secretary in his discretion may extend or waive any time limitation established by these regulations.

STATEMENT

This case involves the right to lease restricted Indian lands under the supervision of the Bureau of Indian Affairs, Department of the Interior. Two parties, Oklahoma Land & Cattle Company and petitioner Gray, were interested in leasing land owned by a restricted Osage Indian, William Fletcher. The

Oklahoma Land & Cattle Company and the Indian signed a lease in April 1964 which the Osage Agency, Pawhuska, Oklahoma, refused to approve because of a prior outstanding lease (Pet. App. A2, A16). The Superintendent of the Agency approved a subsequent lease from the Indian to petitioner Gray on July 20, 1964, without competitive bidding. Gray's lease term was to begin on January 1, 1965 (Pet. App. A17, A22). Oklahoma Land & Cattle Company later learned of this action by the Superintendent, obtained another lease at a higher rental from the Indian and submitted it to the Osage Agency (Pet. App. A3). By letter dated November 3, 1964 (Pet. App. E), the Superintendent informed Fletcher that he had previously approved the lease to Gray on July 20, 1964, and for that reason denied approval of the lease submitted by Oklahoma Land & Cattle Company.

On November 24, 1964, Fletcher and Oklahoma Land & Cattle Company filed an appeal from the Superintendent's decision to the Area Director, Bureau of Indian Affairs (Pet. App. A14). The Area Director cancelled the Gray lease because it was in violation of 25 C.F.R. 131.8(c)[1] and contrary to the best interests of the Indian. The Area Director directed that the land be leased under sealed bidding (Pet. App. A14–A22). His decision was affirmed by the Secretary of the Interior (Pet. App. A10–A12),

[1] 25 C.F.R. 131.8(c) prohibits the issuance of dry-farming leases for more than five-year periods. The lease in question was a combination dry-farming and grazing lease for a period of 10 years. The Secretary held and the court of appeals agreed that the limitation on dry-farming leases should apply to combination dry-farming and grazing leases.

by the United States District Court for the Northern District of Oklahoma (Pet. App. A8–A9) and by the United States Court of Appeals for the Tenth Circuit (Pet. App. A1–A7).

ARGUMENT

Petitioner argues that this Court should grant certiorari to consider the validity of 25 C.F.R. 2.14 under the Due Process Clause of the Fifth Amendment. Petitioner also claims that the validity of this regulation will affect the certainty of leases on some 50,000,000 acres of restricted Indian lands. Petitioner's argument is based on the following from the opinion of the court of appeals (Pet. App. A6):

> The cancellation of the lease does not deprive Gray of any vested property right. Gray cites *Seaton* v. *Texas Co.*, D.C. Cir., 256 F. 2d 718, and other cases to the point that once the United States, acting through an administrative agency, has granted unqualifiedly an interest in land, that grant may not be rescinded. The cases are distinguishable because they relate to no regulation such as 25 C.F.R. § 2.14 which makes approval of the lease subject to a continuing right of appeal in the case of injustice to the Indian. * * *

But there is no occasion in this case to decide whether, under 25 C.F.R. 2.14, the Secretary can cancel a lease at any time if the lease results in an injustice to an Indian. Fletcher's appeal from the decision by the Superintendent approving the Gray lease was filed no more than one day late. The Superintendent approved the lease to Gray on July 20, 1964, and it is undisputed that no written notice was given the Indian

of this final approval by the Superintendent until November 3, 1964 (Pet. App. A23, Pet. 5). 25 C.F.R. 2.4, *supra,* provides for a continuing right of appeal unless an Indian is given written notice of a final action affecting his rights.[2] Assuming that the notice dated November 3, 1964, was mailed on the same day, Fletcher's appeal on November 24, 1964, was filed one day late under the provisions of 25 C.F.R. 2.10(a), *supra,* allowing 20 days after notice of a final action for filing a notice of appeal, "unless further time is granted pursuant to the regulations in this part." The 20-day limit is discretionary and can be waived under the provisions of 25 C.F.R. 2.35, *supra.* Thus, the Area Director, under delegated authority, accepted an appeal filed by Fletcher 21 days after Fletcher was sent notice of the action by the Superintendent affecting his interests. Gray was not to enter on the leased land pursuant to the terms of his lease until January 1, 1965, more than a month following Fletcher's notice of appeal.

Thus, the only real issue raised by the petition is whether the Secretary and his subordinates have the authority to accept a notice of appeal filed one day late and prior to petitioner's entry upon the land. This Court has held that the Secretary's discretion as to matters within his jurisdiction is broad. *Udall* v. *Tallman,* 380 U.S. 1, 16; *Boesche* v. *Udall,* 373 U.S. 472. The decision of the court of appeals is not in conflict with any decision of this Court or any other

[2] The court of appeals upheld the administrative finding that Fletcher was adversely affected by the decision approving the Gray lease (Pet. App. A3).

Circuit. In view of the narrow legal issue presented, review by this Court is not warranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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